

**Colette K. Bohatch, Esq.**

1575 Eye Street, N.W.

Suite 300

Washington, D.C. 20005

DOCKET FILE COPY ORIGINAL

Telephone: 202/289-8400

Facsimile: 202/289-8450

May 11, 1998

BY HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: In the Matter of Federal-State Joint Board on Universal  
Service, CC Docket No. 96-45

Dear Ms. Salas:

Enclosed for filing with the Federal Communications Commission are an original and six copies of a "Motion for Declaratory Ruling or, Alternatively, Petition for Waiver by the State of Florida Department of Management Services", in the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45.

Please date-stamp the two extra copies for return to the undersigned. Thank you.

Sincerely,



Colette K. Bohatch

Enclosures

No. of Copies rec'd  
CLASSCODE

0+14



to the renewal provisions of the State's master contracts for good cause shown.

The Florida DMS further requests that this matter be handled on an expedited basis in order to have a resolution before it submits its Universal Service Fund assistance application for fiscal year 1999, due to the Schools and Libraries Corporation ("SLC") by July 1, 1998.

#### BACKGROUND

In general, FCC regulations applicable to Universal Service Funds require the competitive bidding of telecommunications service contracts in order for them to be eligible for Universal Service Fund assistance. 47 C.F.R. § 54.504(a). Under paragraph (c) of section 54.511, the FCC has provided a limited exemption from competitive bidding for "existing contracts", as therein defined. According to paragraph (d) of that section, however, "the exemption . . . shall not apply to voluntary extensions of existing contracts." Section 54.511(d) was adopted by the Commission in Order No. FCC 97-420, issued in CC Docket No. 96-45 on December 30, 1997. See also 63 Fed. Reg. 2094 (Jan. 13, 1998) (summary of the Fourth Order on Reconsideration and Report and Order, issued Dec. 30, 1997). The Florida DMS is unaware of any prior notice and comment procedures or contemporaneous explanation of this regulation as of the time of its adoption. Apparently, paragraph (d) is intended to thwart attempts by state agencies to

avoid competitive bidding by subsequent amendment of existing contracts to extend their otherwise expiring terms.

All of the State of Florida's current telecommunications master contracts have been competitively bid in accordance with the state's strict statutory and regulatory standards. Under longstanding procurement practice, and as contemplated by statute, each master contract routinely includes a renewal provision as part of its original terms and conditions.<sup>1</sup> Renewal provi-

- 
1. "If the [State] contemplates renewal of the [competitively bid] contract, it shall be so stated in the invitation to bid. The bid shall include the price for each year for which the contract may be renewed." Fla. Stat. Ann. § 287.057. "Renewal' means contracting with the same contractor for an additional contract period after the initial contract period, only if pursuant to contract terms specifically providing for such renewal." Id. § 287.012(14) (emphasis added).

The State of Florida is by no means alone in its practice of incorporating renewal provisions into its contracts ab initio. See, e.g., Miss. Code Ann. § 25-53-121 (State telecommunications support contracts must include an option to renew for two additional fiscal years); Ga. Code Ann. § 50-5-64 (State contracts may be renewed by positive action taken by the State, the nature of which is to be specified in the standard contract); cf. Ind. Code Ann. § 5-22-17-4 (if no price escalation, a contract may be renewed any number of times, but not longer than the term of the original contract).

The Federal Government also uses renewal options. See Federal Acquisition Regulations System, 48 C.F.R. §§ 17.201, 202 (Federal Government may include provisions in its competitively bid contracts to "elect to extend the term of the contract" "when it is in the Government's interest [to do so]"). The Federal Government may exercise an option to extend the term of a contract if, inter alia, it determines that doing so "is the most advantageous method of fulfilling the Government's need, price and other factors . . . considered". Id.

(continued...)

sions are limited under Florida law to two years or to the initial term of the contract, whichever is longer. Fla. Stat. Ann. § 287.057. As a matter of procurement practice, the initial term of most telecommunications services contracts is no longer than three years.

The staff of the SLC, however, has informally advised the Florida DMS that the "existing contract" exemption would be unavailable to the State if it were to exercise the preexisting and limited renewal options incorporated, on inception, into its master telecommunications contracts. The view expressed was that such an exercise would constitute a "voluntary extension" within the meaning of paragraph (d) of section 54.511. Yet, as discussed below, this view is contrary to the written interpretation of paragraph (d) published by the SLC, as well as the clear distinction in the eyes of the law between the renewal of a contract made after its execution and a renewal made pursuant to the terms of the contract itself.

---

1(...continued)

§ 17.207(c)(3). This is exactly the determination that the State of Florida reaches if and when it decides to exercise its contract renewal provisions.

## ARGUMENT

### A. The SLC has Published an Interpretation of § 54.511(d) Under Which the State's Renewal Options Would Not be "Voluntary Extensions".

Approximately two months after the FCC's adoption of section 54.511(d), the SLC published a question and answer Fact Sheet on master contracts (attached as an appendix). In it, the term "voluntary extension" was explicitly and sensibly stated to be an "amendment" to a contract which extended its term. Appendix, Answer to Question 5. This explanation was consistent and contextual with the Answer to Question 6, which discussed "other" amendments that might necessitate rebidding, a proposition clearly not relevant to a preexisting provision in a contract, i.e., one not an "amendment". Florida's contractual renewal options do not contemplate or require any amendment of the master contracts of which they are a part; the State agrees with its counterparty to exercise the renewal provision of the original contract. Upon the SLC's own interpretation of paragraph (d), Florida's exercise of such renewal options should not constitute proscribed "voluntary extensions".

### B. The Law Distinguishes a Contract Renewal or Extension Arising Under the Contract Itself From Those Subsequently Negotiated.

In a leading case analyzing the effect of renewal options in a state contract, Savage v. State, 75 Wash. 2d 618, 453 P.2d 613 (1969), the Supreme Court of the State of Washington addressed

the contention that such options were a subversion of the competitive bidding process. The court, having previously disallowed the State's renewal of a competitively bid contract after it had been executed (in Miller v. State, 73 Wash. 2d 790, 440 P.2d 840 (1968)), observed:

The . . . contract [before the court] does not create the same issue which prevailed under the [previous] contract. That contract . . . ran for 1 year and the state thereafter negotiated a renewal thereof, being in essence a new contract without bidding thereon. In the instant case, the call for bids was for a contract of 1,2,3, or 4-year duration -- at the sole option of the state -- and is not a matter of negotiation at the end of each annual term.

. . . . .

[I]t is contended that a firm 1-year contract with an option to extend constitutes negotiation and is not competitive. We do not agree with this contention, as the duration of a contract is as much a term of agreement as is price, description of the subject matter, and the myriad of other provisions which may be properly included in a purchase contract. These essential terms must be left to the determination of the administrative agency invested with this governmental responsibility.

Id. at 620, 621-22, 453 P.2d at 615-16 (emphasis added).

The Washington Supreme Court's reasoning in Savage is entirely consistent with the SLC's published interpretation of a prohibited "voluntary extension", i.e., an "amendment" -- which the parties necessarily must have negotiated subsequent to the original contract -- and not a preexisting provision of which all original bidders had notice.

Indeed, a Federal District Court in Florida has applied the principles of Savage to the very same question arising under Florida law:

The City's election to extend did not create new and successive contracts. Rather, such elections merely operated to extend the duration of the agreement for specified periods under the same terms and conditions, all of which, including the option itself, had been the subject of the initial [competitive] bidding procedure. Savage v. State, 75 Wash. 2d 618, 453 P.2d 613 (1969). The option to extend, therefore, is in no different posture than the contract as a whole . . . .

City of Lakeland v. Union Oil Co. of California, 352 F. Supp. 758, 763-64 (M.D. Fla. 1973) (citation omitted) (emphasis added).

In short, two courts have considered and rejected the unfounded notion that the exercise of a preexisting contract renewal option which was fully disclosed upon initial solicitation of competitive bids is per se anticompetitive; whether such an exercise is or is not beneficial to the citizens of a state, in the words of the Washington Supreme Court, "must be left to the determination of the administrative agency invested with this governmental responsibility" (as is the case with Federal procurement, see note 1, pp. 3-4). The SLC will profoundly derogate this sound proposition by insisting that Florida's considered exercise of such a determination will forfeit millions of dollars in Universal Service Fund assistance.

C. Florida's Citizens are Unsoundly Being Forced to Choose Between the Benefits of Existing Competitively Bid Contracts and Universal Service Fund Assistance.

The State of Florida estimates that its schools and libraries could receive as much as \$175 million in Universal Service Fund assistance, but for the fact that many of them purchase their telecommunications services from existing State master contracts. Their small size and limited resources make this a practical necessity; indeed, the leverage and economies of scale that only the State can furnish to its municipal constituencies were a primary motivation for the master contract program.

Under the SLC's informal view, all of the State's telecommunication contracts have to be untimely truncated and rebid to be eligible for Universal Service Fund assistance. Since some of these contracts have already reached the renewal stage, the State has taken the precaution of rebidding them, even though it disagrees with the SLC's informal interpretation of paragraph (d). This rebidding has plunged Florida's otherwise orderly and efficient telecommunications contracting program, ordinarily entailing lead times of six to nine months, into a morass.

Even so, Florida still has eight large and complex telecommunications master contracts pending, all competitively bid and all with renewal provisions, now being used by the State's schools and libraries; the expiration of the initial term of many of them is imminent. Hundreds of hours of staff time and hun-

dreds of thousands of dollars will be wasted in their rebidding, while the citizens of Florida are denied the potential benefit of their renewal provisions competitively obtained. Vendors, who expected renewal subject to their continuing competitiveness, will attempt to recover their fixed costs over the shortened life of the contracts and therefore increase the immediate cost to the State. The long-scheduled procurement of other services will be jeopardized in the frantic telecommunications rebidding process, ironically requiring emergency waivers of many of the State's procedures intended to promote competition.

Alternatively, absent wholesale rebidding of these telecommunications contracts (which serve all the State's constituencies), Florida's schools and libraries would be faced with a Hobson's choice: undertake multiple unfamiliar, costly, and -- very likely -- uneconomical telecommunications procurements, or forego substantial amounts of much needed financial assistance that national policy has provided.

#### RELIEF REQUESTED

Based on the foregoing, the Florida DMS respectfully requests a declaratory ruling that exercise of its renewal provisions, since they are part of the original master contracts, would not disqualify the master contracts as "existing contracts". Such a ruling would make the master contracts exempt from competitive bidding until the expiration of their renewal

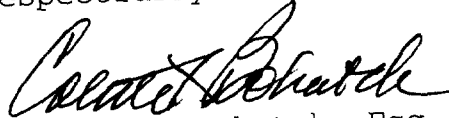
terms, typically no longer than three years after their initial terms.

If, however, the Commission does not render such ruling, the Florida DMS alternatively petitions the Commission, for good cause shown, to waive 47 C.F.R. § 54.511(d), to the extent that the State's exercise of its renewal provisions, as described herein, would otherwise be deemed "voluntary extensions" of such contracts.

The Florida DMS seeks expedited treatment of its request in order to have a resolution before it submits its Universal Service Fund assistance application for fiscal year 1999, due to the SLC by July 1, 1998.

Separately, on May 6, 1998, the Florida DMS submitted a letter request for interpretation of 47 C.F.R. § 54.511(d) to the FCC's Common Carrier Bureau. If the Common Carrier Bureau renders the favorable interpretation requested therein, the Florida DMS will withdraw this motion for declaratory ruling and petition for waiver as moot.

Respectfully submitted,



Colette K. Bohatch, Esq.  
Counsel for  
State of Florida  
Department of Management Services

1575 Eye Street, N.W., Suite 300  
Washington, D.C. 20005  
Tel: (202) 289-8400  
Fax: (202) 289-8450

Of Counsel:  
Paul A. Rowell, Esq.  
General Counsel  
State of Florida  
Department of Management Services

4050 Esplanade Way, Suite 260  
Tallahassee, Florida 32399-0950  
Tel: (850) 487-1082  
Fax: (850) 922-6312

Dated: May 11, 1998

## Appendix

**SLC Fact Sheet on Master Contracts**  
**February 24, 1998**

**Q. 1) What is a master contract?**

**A.** A master contract is a contract competitively bid by a state or third party on behalf of eligible schools and libraries. Eligible schools and libraries may purchase services at prices set forth in the master contract. Generally speaking, the master contract may offer favorable prices and terms of service to eligible schools and libraries.

**Q. 2) Does the competitive bidding requirement apply to master contracts?**

**A.** The same rules that govern pre-existing contracts also govern master contracts. Master contracts signed on or before July 10, 1997 are exempt from the competitive bid requirement for the duration of the contract. Master contracts signed on or after July 10, 1997 and before January 30, 1998 are exempt from the competitive bidding requirement for the period January 1, 1998 through December 31, 1998; for services commencing January 1, 1999, the contract must be rebid. Master contracts signed after January 30, 1998 must comply with the competitive bidding requirement of the Schools and Libraries Discount Program. The date that the master contract was signed represents the applicable date for purposes of determining whether or to what extent the contract may be exempt from the competitive bid requirement.

**Q. 3) Are voluntary extensions of existing contracts exempt from the competitive bidding requirement?**

**A.** No, the FCC rules (47 C.F.R. Section 54.11(d)) expressly states that the exemption from competitive bidding does not apply to voluntary extensions of existing contracts.

**Q. 4) Are voluntary extensions of master contracts exempt from the competitive bidding requirement?**

**A.** No, because master contracts are governed by the same rules that govern pre-existing contracts, and the FCC rule at 47 C.F.R. Section 54.18(d) expressly excludes voluntary extensions from the competitive bidding exemption for pre-existing contracts.

**Q. 5) What is a voluntary extension of an existing contract?**

**A.** A voluntary extension is an amendment which enables the contracting party to choose unilaterally whether to lengthen the term of the existing contract beyond the termination date

prescribed in the existing contract. In other words, the extension is completely at the option of the contracting party who has no contractual penalties for not exercising the option.

- Q. 6) Are other types of contract amendments besides a voluntary extension required to be competitively bid?**
- A.** Whether or not other types of contract amendments besides a voluntary extension of an existing contract are required to be competitively bid is a matter of state or local law. If state or local law does not require the amendment to be competitively bid, then the amendment is also exempt from the Schools and Libraries Discount Program competitive bidding requirement. If state or local law does not address the requirements for competitively bidding a contract amendment, then the federal procurement doctrine of the "cardinal change" rule will determine whether an amendment must be competitively bid (See Para. 226-228 in the Fourth Order on Reconsideration, CC Docket # 96-45 (Issued December 30, 1997)).
- Q. 7) If a master contract which was signed on or before July 10, 1997 expires sometime during the 1998 funding year for the Schools and Libraries Discount Program, may an eligible school or library rely on the master contract as the basis for filing a 470 and 471 application and be exempt from the competitive bidding requirement?**
- A.** If the master contract which was signed on or before July 10, 1997, is due to end sometime during the 1998 program year, then schools and libraries may rely on the master contract as the basis for executing their own respective contracts with the service provider bound by the master contract. If permitted under state or local law, the individual contract negotiated by an eligible entity with the service provider to purchase services at the prices and terms available under the master contract may last beyond the expiration date of the master contract, and remain qualified as a pre-existing contract. In contrast, the state or third party who negotiated the master contract could not voluntarily extend a pre-existing master contract without complying with the competitive bidding requirement.